SEP 26 1972

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-500

D'ARNOLD DAVIS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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D'ARNOLD DAVIS,
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vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

The petitioner D'Arnold Davis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on June 28, 1972.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 30 Ohio St. 2d 312 (1972), *State v. Wilson,* and is reprinted in Appendix A. The judgment of the Supreme Court of Ohio, filed on June 28, 1972, is reprinted in Appendix B. The opinion of the Court of Appeals of Cuyahoga County, filed March 25, 1971, is reprinted in Appendix C. The findings of fact issued by the trial court, filed March 5, 1970, are reprinted in Appendix D.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 28, 1972. No rehearing was sought. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257 (3).

QUESTIONS PRESENTED

(1) In a criminal trial, do the Sixth Amendment rights of defendants and the Fourteenth Amendment rights of defense counsel to fundamental fairness bar a state court's contempt conviction on the grounds that counsel made unnecessary objections and constantly disregarded the court's orders to sit down where the record does not clearly show that counsel did not sit down each time ordered to do so, or that he made unnecessary objections?

(2) Does the record clearly show unnecessary objections and counsel's failure to sit down when ordered where such orders to sit down were the trial court's response, in lieu of rulings to objections, including an early request for a continuing objection, to the cross-examination of a defense witness with a written statement marked as an exhibit without affording an examination of the exhibit to defense counsel, and counsel's failure to sit down when ordered was not recited by the trial judge, at the time counsel was advised he would answer for contempt, at the time he was adjudged in contempt, and at the time he was fined and sentenced to jail, such recitation first appearing in a journal entry filed fourteen days after the verdict and three days after counsel was sentenced to five days in jail and fined five hundred dollars?

(3) Do such Sixth and Fourteenth Amendment rights require that before counsel can be convicted of con-

tempt for making unnecessary objections, the record at least show an unequivocal protection of his client's appellate rights as well as a specific order to make no further objections?

(4) Where such contempt conviction is founded on a non-verbal act (disregard of the court's order to sit down), must such act appear in the record by undisputable inference or by contemporaneous description on the record by the trial judge?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

U. S. Const. Amend. VI.

"No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

U. S. Const. Amend XIV, §1.

"A court . . . may summarily punish a person guilty of misbehavior in the presence of or so near the court . . . as to obstruct the administration of justice."

Ohio Rev. Code § 2705.01.

STATEMENT OF THE CASE

This case stems from petitioner's role as defense counsel for two men charged with murder. In the course of the trial, the prosecuting attorney commenced the cross-examination of a defense witness by marking a document as an exhibit purported to be a statement signed by that witness. Petitioner's request for examination of the exhibit was initially met with the court's rejoinder that it had not been used and then, when it undeniably was used, by the rejoinder that counsel could see the document at "the proper time," without stating what that proper time was. Petitioner's repeated objections to the prosecutor's questions, including an early request for a continuing objection, were evaded by the court's statements that petitioner sit down. At no time was petitioner ordered to remain seated or to desist from further objections.

The verbatim record of the incident that occurred on February 19, 1970 is very brief, and as the record is essential to the questions presented, it is accordingly set forth verbatim:

> "(Excerpt from cross-examination of BARBARA LIPSCOMB, by Mr. Sullivan:)
>
> (State's Exhibit E-1 and E-2 marked for identification.)
>
> Q. Handing you what has been marked for identification purposes E-1 and 2—
>
> Mr. Davis. May I see them, please.
>
> The Court. You may at—
>
> Mr. Davis. It's been identified. I have a right to see them.
>
> The Court. He hasn't used them at this time.
>
> Mr. Sullivan. I haven't used them.
>
> Q. Would you look at these and see if you can identify them.
>
> Mr. Davis. May I now, your honor, see them?

They are being used.

The Court. Just a moment, please. At the proper time.

Mr. Davis. May I address the bench?

The Court. At the proper time, Mr. Davis.

Mr. Davis. May I address the bench?

Q. Can you identify it?

A. It looks like the same—

Mr. Davis. May I address the bench?

The Court. Please sit down.

Q. What is that?

A. It looks like the same piece of paper you had at the house.

Q. Who?

A. Not you, this man sitting over here (indicating).

Q. This good looking detective here?

A. That's the one that wanted to put me in jail.

Q. Isn't that your signature, 'Barbara Lipscomb'?

Mr. Davis. I object, and request the right to examine the document.

The Court. Mr. Davis, please sit down.

Q. Isn't that your signature, 'Barbara Lipscomb'?

A. Yes.

Mr. Davis. May the record show a continuing objection? I have a motion.

The Court. Mr. Davis, will you please sit down.

Q. Wasn't this question asked of you, "Have you read the above statement and is it true?" and did you put the answer, "Yes," and sign?

Mr. Davis. I object.

The Court. Mr. Davis.

A. Uh-huh, yes.

Q. This is your statement; isn't that correct?

A. Let me see it.

Mr. Davis. I object.

The Court. Overruled.

Mr. Davis. May the record show I request the right to examine what has been identified as—

The Court. At the proper time. Mr. Davis, if you don't sit down—just a moment—at the proper time you may see the statement.

Mr. Davis. May I come to the bench?

The Court. If you will sit down now—

Q. You did sign this, didn't you?

Mr. Davis. I object.

The Court. Overruled.

A. Yes, sir.

Q. You signed 'Yes," and signed your name?

A. Yes, after you told me you were going to put me in jail for not making a statement.

Mr. Davis. I object.

The Court. Overruled.

Mr. Davis. May I approach the bench?

The Court. If you will sit down, Mr. Davis—will the reporter come forward."

At the side bar conference the trial judge advised petitioner that he would answer to her for contempt "on this" and when the witness was excused adjudged him in contempt. Sentencing was imposed after the jury's return of a verdict of acquittal.

On appeal from the trial court's conviction for contempt and sentence of a $500 fine and five day jail sentence, petitioner asserted as Assignment of Error No. 1, Subparagraph D that:

> "The rights of criminal defendants to due process of law under the Federal and Ohio Constitutions require that counsel be given wide latitude in conducting an independent and vigorous defense."

After affirmance of the conviction by the Court of Appeals petitioner reiterated the important constitutional

questions involved to the Supreme Court of Ohio in his Memorandum in Support of Jurisdiction including the following Proposition of Law No. 1:

> "Under the Ohio and United States Constitutions a criminal defendant is entitled to representation at his trial by counsel who is free to insist that the record reflect whatever seems necessary to preserve the defendant's rights to an appellate review of the trial court's rulings."

The Supreme Court of Ohio in its opinion found that while the federal decisions were highly persuasive, these decisions were not binding on it, since they represented the exercise of the supervisory authority by the United States Supreme Court over federal courts. In Ohio, according to the court, counsel owed "total deference to the court" regardless of the amount of provocation on the part of the judge; contumelious judicial behavior being correctible by appellate review, grievance proceedings, impeachment and the election process.

The Supreme Court's opinion does not suggest how the remedy of appellate review can be effective where the judicial misconduct impedes the making of the record itself. In addition, the Supreme Court stated the petitioner made unnecessary objections, implicitly ruling that petitioner should have known at what point his record was sufficiently protected. Like the trial court, however, it failed even to suggest when that point was reached.

REASONS FOR GRANTING THE WRIT

This writ should be granted so that counsel can be assured that where there is any doubt as to what is required to sufficiently protect the rights of their client for appellate review that they must resolve such doubt in favor of their client by persistent objections, absent assurance by the trial court of the protection of those rights, as for example, a clear directive to desist from further objections or the granting of a continuing objection. Fundamental fairness requires that counsel not be placed in the impossible dilemma of determining, in the heat of battle at the peril of either their client or themselves, as to the exact point where their client's rights have been protected by sufficient objections.

The record in this case further clearly demonstrates that counsel cannot fulfill their obligations to afford their clients a vigorous defense if they can be found guilty of contempt for non-verbal acts not reflected in the record by either undisputable inference or contemporaneous recital and description by the trial judge. As pointed out by Mr. Chief Justice Burger in his concurring opinion joined in by Mr. Justice Rehnquist in *In re Little*, 404 U.S. 553, 556 (1972):

> "A contempt holding depends in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemnor; these cannot be dealt with except on full ventilation of the facts."

Requiring anything less than undisputable inference or contemporaneous recital places attorneys at the mercy of trial judges humanly seeking to justify their position by unconscious reconstruction at a later date.

The failure of this Court to clarify this situation by granting this writ would inhibit and chill meaningful representation by counsel in Ohio. The fact that erosion of

this important constitutional guarantee would be masked, since its only indicia would be continuing affirmances of convictions by Ohio appellate courts because the client's rights were waived or not adequately protected on the record by counsel, renders the granting of this writ all the more compelling.

The final reason why this Court should grant this writ is to give sorely needed guidance to the trial bar and bench as to their respective obligations by emphasizing the duty of the trial judge to cooperate in protecting the record for appellate review by avoiding ambiguous rulings, allowing continuing objections or clearly ordering counsel to desist from further objections, and by such simple means avoid the continued occurrence of situations such as that reflected in this record. In the absence of such simple cooperation by the trial judge, counsel must be assured both that they are obligated to protect the constitutional rights of their clients by good faith and courteous, though dogged insistence that the record be protected by continuing objections, and that the fullfillment of that obligation will not subject them to a contempt conviction.

CONCLUSION

A writ of certiorari should issue to review the judgment and the opinion of the Supreme Court of Ohio to halt the erosion of the rights of defendants to a vigorous defense by the arbitrary use of the contempt power while at the same time facilitating the orderly conduct of trials.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Supreme Court of Ohio

(Decided June 28, 1972)

No. 71-394

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Plaintiff-Appellee,
vs.
WILLIAM J. WILSON, *et al.*,
D'ARNOLD DAVIS,
Contemnor-Appellant.

Contempt of court—Conduct of counsel at trial—Disregard of court order—Appeal—Record—Finding of contempt affirmed, when.

APPEAL from the Court of Appeals for Cuyahoga County pursuant to the allowance of a motion for leave to appeal.

Appellant, an attorney at law, represented the defendants in their murder trial in Cuyahoga County. The jury returned a verdict of acquittal. Thereafter, in a summary proceeding, the trial judge found appellant in contempt for his conduct in open court during the trial. He was fined $500 and sentenced to five days imprisonment. The Court of Appeals affirmed the fine but suspended the jail sentence.

Mr. John T. Corrigan, prosecuting attorney, and *Mr. Harvey R. Monck*, for appellee.

Messrs. Jones, Day, Cockley & Reavis and *Mr. Crede C. Calhoun,* for appellant.

Per Curiam. Appellant's first two propositions of law raise the substantive question whether, on the minimal record presented to us, his conduct is shown to have constituted contempt of court.

During the cross-examination of a defense witness, the assistant prosecuting attorney handed her two papers containing her prior statements which had been marked as state's exhibits for identification. Before counsel could complete his question, appellant interrupted with a request to see the papers. Again, before the judge could complete a ruling which apparently was intended to be that appellant could see them at the proper time, appellant interrupted with a remark that the papers had been identified by the witness and he had the right to see them. In fact, they had not then been identified by the witness.

The very next question asked for the identification, and appellant renewed his request for an examination. That was denied until "the proper time." He asked to address the bench. He was put off until "the proper time." He asked twice again to address the bench. The judge ordered him to "please sit down."

When the witness finally identified her signature, appellant objected and again requested examination of the document. He was ordered to "please sit down." He asked for a continuing objection. He was ordered to "please sit down."

Appellant made three more objections to the questioning, all of which were overruled, and another request to examine. He was ordered three more times to "sit down."

Then a "side bar" commenced at which the court charged appellant with contempt. Appellant then inter-

rupted the court and was ordered to sit down four more times. Prior to the last time and apparently in a loud voice appellant moved for a mistrial and, *inter alia*, again objected to the use of the statement without examination by him.

When the trial resumed, appellant was ordered to "sit down" three more times. At the close of the cross-examination, he finally received the exhibits, examined them and excused the witness without further questions.

This unfortunate episode constitutes the entire portion of the record before us which could possibly support the finding of contempt. The question is, does it?

The incident described must have been the culmination of previous contentions to which the record alludes, but it does not reveal them. The precise nature of all disruptions by counsel, including inflections, actions and gestures, should have been described in detail to the record.

The record here does show, however, that appellant unnecessarily repeated objections, requests for examination and requests for the maintenance of the record (especially when it was obvious that no interruption or silencing of the reporter occurred or was ordered) and a constant disregard of the court's order to sit down, all of which amounted to disrespect for the court, to disruption of quiet and order, and to actual interruption of the court in the conduct of its business. *Nye v. United States* (1941), 313 U. S. 33, 52. That such constituted contemptuous conduct we entertain no doubt.

The integrity of the judicial process demands total deference to the court, particularly on the part of its officers. Respect for the law and obedience to the orders and judgments of the tribunals by which it is enforced lies at the very foundation of our society. No amount of provocation on the part of the judge can be permitted to excuse counsel from the obligation of his oath of office ("I

will maintain the respect due to courts of justice and judicial officers"); to excuse him from his duties imposed by the Code of Professional Responsibility;* or to condone the acts of counsel if in fact they are in themselves contemptuous.

If a judge behaves contumeliously, reprehensible as it may be, such conduct should be made a part of the record, but cannot be corrected by counsel in the courtroom. There are other remedies for transgressions of judicial decorum, none of which is exclusive—such as appellate review, grievance proceedings under our Rules, impeachment and the election process, for example.

In connection with the substantive question of contempt, appellant leans heavily upon the United States Supreme Court cases of *Bloom v. Illinois* (1968), 391 U. S. 194; *In re McConnell* (1962), 370 U. S. 230; and *Offutt v. United States* (1954), 348 U. S. 11. Although binding

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*"Code of Professional Responsibility:
"Duty of the Lawyer to the Adversary System of Justice.
"
. . . .
"EC 7-22 Respect for judicial rulings is essential to the proper administration of justice. . . .
"
. . . .
"EC 7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and aboveboard in his relations with a judge or hearing officer before whom he appears. . . .
"
. . . .
"DR 7-106 TRIAL CONDUCT.
"(A) A lawyer shall not disregard . . . a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.
"
. . . .
"(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
"
. . . .
"(6) Engage in undignified or discourteous conduct which is degrading to a tribunal."

upon us, *Bloom* is inapplicable in that it imposes the requirement of a jury trial in contempt matters involving punishment equivalent to that which characterizes an offense as "serious," *i. e.*, a confinement for six months or more. Here, appellant does not claim a right to a jury trial and this appeal involves no more than a fine.

Both *McConnell* and *Offutt* represent the exercise of the supervisory authority by the United States Supreme Court over the administration of criminal justice in the federal courts and therefore do not bind us. However, they are highly persuasive but distinguishable. In *McConnell*, counsel merely threatened to pursue a line of questioning forbade by the trial judge unless some bailiff intervened. He never carried out the threat. The court held that one threat did not amount to an obstruction of justice.

In *Offutt*, the judge displayed personal animus and a lack of judicial demeanor, but the contemnor was not excused. The cause was remanded for retrial before a different judge.

To support his final proposition of law relating to procedure, appellant cites, in addition, *Mayberry v. Pennsylvania* (1971), 400 U. S. 455, 27 L. Ed. 2d 532, and *Cooke v. United States* (1925), 267 U. S. 517.

In *Cooke*, the alleged act of contempt was not committed in open court. It involved language personally derogatory to the judge which was contained in a letter delivered to chambers. *Mayberry* accorded the constitutional requirement of a public trial by another judge to one who participated in extreme vilification, during trial, of the judge who later sentenced him to an 11- to 22-year jail sentence for his clearly contemptuous conduct.

The instant case, of course, involves no vilification of the judge and no attack personal or derogatory to the judge. If anything of that nature did occur, the record brought to us does not show it. The following statement

by Chief Justice Taft in the opinion of *Cooke, supra* (267 U. S. 516, at 534), furnishes a complete answer to appellant's final proposition:

> "To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of common law and the punishment imposed is due process of law. Such a case had great consideration in the decision of this court in *Ex parte Terry*, 128 U. S. 289. It was there held that a court of the United States upon the commission of a contempt in open court might upon its own knowledge of the facts without further proof, without issue or trial, and without hearing an explanation of the motives of the offender, immediately proceed to determine whether the facts justified punishment and to inflict such punishment as was fitting under the law."

That statement is the law today, even in the face of *Mayberry* and *Bloom*, subject of course to the modifications imposed by those two cases when the circumstances of the particular situation compel them. See, also, *In re Lands* (1944), 146 Ohio St. 589, and *Lowe v. State* (1859), 9 Ohio St. 337.

In light of the foregoing, it is immaterial to the regularity of appellant's conviction that the trial court made additional findings of contempt after imposing sentence (and spread the same upon the record) which are not clearly supported by the record. It is also immaterial that such practice is to be condemned.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., SCHNEIDER, HERBERT and LEACH, JJ., concur.

CORRIGAN, STERN and BROWN, JJ., dissent.

Dissenting Opinion

STERN, J., dissenting. I dissent on the ground that the scant record provided this court by counsel for both sides is insufficient to clearly show the courtroom temper of the parties on the day in question. I cannot permit myself to read into this record something which is not clear on its face.

I have no argument with the facts as related in the majority opinion, but I fail to see how the questioned conduct of attorney Davis, who was bent upon defending the constitutional rights of two clients in a first degree murder trial, can constitute direct, criminal contempt. The barren record does not support a conclusion that appellant either intended to or did exhibit "conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions." Paragraph one of the syllabus of *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St. 2d 55.

Although appellant did disregard repeated orders of the court to "sit down," mere disobedience of an order *of this nature* does not necessarily constitute contempt. To so hold would be to ignore the tense atmosphere of a criminal trial in a capital case, and would impose upon counsel an onerous burden of personal caution which could impede his performance of the duty to which he devotes himself.

Had appellant's conduct been such as to amount to contempt, it could not be excused by judicial errors or improprieties on the part of the court. If the evidence supported a finding that appellant's conduct was contemptu-

ous of the trial court, a fine of $500 and a sentence to five days in jail for the centemnor, who is an officer of the court, would not seem unduly excessive. However, while appellant may have been overzealous at times in asserting and endeavoring to protecting his clients' rights, I feel that the record will support no conclusion other than that such conduct constituted a good-faith effort to represent his clients' interests, without impeding the functions or offending the dignity of the court. In my view, appellant's conduct, as demonstrated by the record before us, did not constitute a direct, criminal contempt of the court, and the judgment should be reversed.

CORRIGAN and BROWN, JJ., concur in the foregoing dissenting opinion.

APPENDIX B

Judgment of the Supreme Court of Ohio

(Entered June 28, 1972)

No. 71-394

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Plaintiff-Appellee,
vs.
WILLIAM J. WILSON, *et al.*,
D'ARNOLD DAVIS,
Contemnor-Appellant.

APPEAL FROM THE COURT OF APPEALS FOR
CUYAHOGA COUNTY, OHIO

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

APPENDIX C

Opinion of the Court of Appeals of Ohio

(Dated March 25, 1971)

No. 30,385

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY

STATE OF OHIO,
Plaintiff-Appellee,

vs.

WILLIAM J. WILSON,
RONALD PERRY,
Defendants,

D'ARNOLD DAVIS,
Contemnor-Appellant.

Judgment affirmed in part and modified in part. Contemnor's sentence is reduced to a $500.00 fine.

A judge must maintain discipline and decorum in his court room.

Lawyers shall be allowed to make honest, good faith efforts to represent their clients. However, when an aggressive, overzealous lawyer, in representing his clients, carries it to a point where it is considered an obstruction to the administration of justice, he may be found guilty of contempt of court under Section 2705.01, Revised Code.

The record in the present case clearly supports the contempt citation. However, the lawyer's conduct did not warrant a jail sentence. Such sentence was an abuse of discretion.

The judgment of the lower court is affirmed as to the contempt citation and the $500.00 fine. The five-day jail sentence is hereby suspended.

Exc. O. S. J.

MANOS, P. J., KRENZLER, J., JACKSON, J. Concur.

APPENDIX D

Findings of Fact of Trial Court

(Filed March 5, 1970)

No. 92,246

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY, SS.

STATE OF OHIO,
Plaintiff,

vs.

WILLIAM J. WILSON,
RONALD PERRY,
Defendants.

February 19, 1970:

This day the Court finds D'Arnold Davis, Esq., Attorney for defendants Ronald Perry and William J. Wilson, guilty of misbehavior in the presence of the Court as follows:

By interfering with the Prosecuting Attorney's questioning of a witness in open court, to wit:

(1) Grabbing for papers which were being marked for exhibits;
(2) Shouting and insisting that he see the papers and be heard, making it difficult for the jury to hear and see the witness;
(3) Shouting in a loud voice in such manner that the Court and the jury could not hear the questions of the Prosecutor nor the answers of the witness;
(4) Completely disregarding the instructions of this Court to be seated;

(5) Debasing and defiling the dignity of the Court by continuing these disgraceful antics after being admonished by the Court to cease;

all of which were wrongful deliberate acts designed and calculated to impede; embarrass and obstruct the Court in the administration of justice.

On numerous occasions throughout the entire trial, both on and off the record, out of the hearing of the jury, the Court admonished Mr. Davis for his disgraceful behavior in the courtroom but to no avail.

The Court feels that under the circumstances it had no other alternative in this matter but to find Mr. D'Arnold Davis in direct contempt of court.

Passed for sentence.

/s/ BLANCHE KRUPANSKY, *Judge*